

1 ROBERT W. FERGUSON
Attorney General
2 MITCHELL A. RIESE
NEAL LUNA
3 Assistant Attorneys General
Attorney General of Washington
4 Civil Rights Division
800 Fifth Avenue, Suite 2000
5 Seattle, WA 98104
(206) 464-7744
6
7
8

9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF WASHINGTON**

11 STATE OF WASHINGTON,

12 Plaintiff,

13 v.

14 CITY OF SUNNYSIDE; AL
ESCALERA, in his official and
individual capacities; MELISSA
15 RIVAS, in her official and
individual capacities;
16 CHRISTOPHER SPARKS, in his
official and individual capacities;
17 JOEY GLOSSEN, in his official
and individual capacities; and
18 JAMES RIVARD, in his official
and individual capacities
19

20 Defendants.
21
22

NO. 1:20-CV-3018-RMP

PLAINTIFF STATE OF
WASHINGTON'S
RESPONSE TO
DEFENDANTS' MOTION
TO DISMISS

MAY 11, 2019
WITH ORAL ARGUMENT:
1:30 P.M.
Ph: 1-888-363-4749
ACCESS CODE: 6699898#

PLAINTIFF STATE OF
WASHINGTON'S RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL AND PROCEDURAL BACKGROUND	2
III.	ARGUMENT.....	2
A.	Motion to Dismiss Standard.....	2
B.	The Allegations of the Complaint Establish Washington’s <i>Parens Patriae</i> Standing	3
C.	Washington’s Claims Are Timely.....	11
D.	Washington’s Allegations Establish Municipal Liability Against Sunnyside.....	13
E.	Washington Has Alleged Facts Establishing a Prima Facie Case of Housing Discrimination Under Federal and State Law	15
F.	Washington May Enforce the Residential Landlord Tenant Act	18
G.	Washington Does Not Seek Damages for Violations of the Washington Constitution.....	19
H.	Remand to State Court is the Only Possible Remedy if This Court Lacks Subject Matter Jurisdiction	19
IV.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,</i> 458 U.S. 592 (1982)	4, 10
<i>ASARCO Inc. v. Kadish,</i> 490 U.S. 605 (1989)	20
<i>Ave. 6E Invs., LLC v. City of Yuma,</i> 818 F.3d 493 (9th Cir. 2016)	17
<i>Bank of America Corp. v. City of Miami,</i> 137 S. Ct. 1296 (2017)	3, 17
<i>Bruns v. Nat’l Credit Union Admin.,</i> 122 F.3d 1251 (9th Cir. 1997)	20
<i>City of Oklahoma City v. Tuttle,</i> 471 U.S. 808 (1985)	13
<i>City of Seattle v. McKenna,</i> 259 P.3d 1087 (2011)	18
<i>Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props, LLC,</i> No. C16-922 TSZ, 2017 WL 2022462 (W.D. Wash. May 12, 2017)	16
<i>Garrett v. City of Escondido,</i> 465 F. Supp. 2d 1043 (S.D. Cal. 2006)	13
<i>Gutowsky v. County of Placer,</i> 108 F.3d 256 (9th Cir. 1997)	12
<i>Kumar v. Gate Gourmet, Inc.,</i> 325 P.3d 193 (Wash. 2014)	16
<i>Massachusetts v. Bull HN Info. Sys., Inc.,</i> 16 F. Supp. 2d 90 (D. Mass. 1998)	6
<i>Missouri ex rel. Hawley v. Becerra,</i> 137 S. Ct. 2188 (2017)	4

1	<i>Missouri ex rel. Koster v. Harris,</i>	
2	847 F.3d 646 (9th Cir. 2017).....	4, 7, 10
3	<i>Mohamed v. Jeppesen Dataplan, Inc.,</i>	
4	614 F.3d 1070 (9th Cir. 2010).....	3
5	<i>New York v. 11 Cornwell Co.,</i>	
6	695 F.2d 34 (2d Cir. 1982).....	3, 5, 10
7	<i>New York v. Mid Hudson Med. Grp., P.C.,</i>	
8	877 F. Supp. 143 (S.D.N.Y. 1995).....	7, 10
9	<i>New York v. Peter & John's Pump House, Inc.,</i>	
10	914 F. Supp. 809 (N.D.N.Y. 1996).....	6, 10
11	<i>Oregon ex rel. Dep't of Transp. v. Heavy Vehicle Elec. License Plate, Inc.,</i>	
12	157 F. Supp. 2d 1158 (D. Or. 2001)	3
13	<i>Oviatt v. Pearce,</i>	
14	954 F.2d 1470 (9th Cir. 1992).....	13
15	<i>Pennsylvania v. Porter,</i>	
16	659 F.2d 306 (3d Cir. 1981).....	3, 5, 9
17	<i>Pfaff v. U.S. Dep't of Hous. & Urban Dev.,</i>	
18	88 F.3d 739 (9th Cir. 1996).....	16
19	<i>Polo v. Innoventions Int'l, LLC,</i>	
20	833 F.3d 1193 (9th Cir. 2016).....	20
21	<i>Reeder v. King County,</i>	
22	358 P.2d 810 (Wash. 1961).....	19
	<i>Support Ministries For Persons With AIDS, Inc. v. Village of Waterford.,</i>	
	799 F. Supp. 272 (N.D.N.Y. 1992).....	6, 10
	<i>Tafoya v. State Human Rights Comm'n,</i>	
	311 P.3d 70 (Wash. Ct. App. 2013).....	16
	<i>Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.,</i>	
	135 S. Ct. 2507 (2015)	15, 16

1	<i>Victor Valley Family Res. Ctr. v. City of Hesperia</i> ,	
2	No. ED-CV-16-00903-AB, 2016 WL 3647340	
	(C.D. Cal. July 1, 2016)	12, 13, 14
3	<i>Wallace v. Kato</i> ,	
4	549 U.S. 384 (2007)	12
5	<i>Washington v. LG Elecs., Inc.</i> ,	
	375 P.3d 636 (2016)	11
6	<i>Washington v. Schwab</i> ,	
7	693 P.2d 108 (Wash. 1985)	18
8	<i>Wyler Summit P'ship v. Turner Broad. Sys., Inc.</i> ,	
	135 F.3d 658 (9th Cir. 1998)	2
9	<u>Statutes</u>	
10	28 U.S.C. § 1447(c)	20
11	42 U.S.C. § 3604(a)	15, 17
12	42 U.S.C. § 3604(a)-(b)	15
13	Wash. Rev. Code § 4.16.080	12
14	Wash. Rev. Code § 4.16.160	11
15	Wash. Rev. Code § 7.24.010	19
16	Wash. Rev. Code § 7.24.190	19
17	Wash. Rev. Code § 43.10.030(1)	18
18	Wash. Rev. Code § 49.60.030(1)	15
19	Wash. Rev. Code § 49.60.222	15
20	Wash. Rev. Code § 49.60.222(1)(f)	15, 17
21	Wash. Rev. Code § 59.18.020	18
22		

Other Authorities

<i>Demographics of Puerto Rico</i> , Wikipedia.org, https://en.wikipedia.org/wiki/Demographics_of_Puerto_Rico (last visited Mar. 26, 2020)	4
U.S. Dep't of Commerce, Bureau of the Census, <i>1980 Census of Population</i> , Table 14, 34-15 (1980), https://www2.census.gov/prod2/ decennial/documents/1980/1980censusofpopu80134unse_bw.pdf	5

I. INTRODUCTION

The State of Washington (Washington) alleges the City of Sunnyside and its law enforcement officers committed egregious civil rights violations by adopting a policy or practice of expelling Sunnyside residents from their homes without any due process whatsoever. Rather than explain or defend the merits of its official practice, Sunnyside seeks to avoid accountability in this Court or any other.

In a prior matter, this Court granted without prejudice Defendants' motion to dismiss, reasoning that Washington lacked the *parens patriae* standing necessary to proceed in federal court. *Washington v. City of Sunnyside*, No. 1:19-CV-3174-RMP (W.D. Wash. Dec. 6, 2019) (*Sunnyside I*), ECF No. 16. Washington amended its allegations and re-filed in state court. Complaint (Compl.) ECF No. 1-1. Defendants nevertheless removed this matter back to federal court, and now seek to dismiss on identical grounds. But as alleged in the Complaint, Defendants' actions have had severe effects on those Sunnyside residents directly affected, and wide-ranging effects on Washingtonians indirectly affected. Compl. ¶¶ 2.2, 5.20–5.38, 5.43–5.44. The Complaint alleges sufficient facts to establish Washington's *parens patriae* standing under longstanding civil rights case law, which Defendants' motion does not even mention, let alone attempt to distinguish. The Complaint also states seven valid claims for relief, none of which is barred by any statute of limitations. The Court should deny Sunnyside's motion to dismiss. Alternatively, if the Court

determines Washington still lacks standing, the Court should remand this matter to state court.

II. FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit was filed in Yakima County Superior Court on February 5, 2020. Defendants removed the case to this Court the next day. ECF No. 1.

In the current matter (*Sunnyside II*), Washington continues to allege that Sunnyside adopted and enforces a program of extra-judicial evictions carried out by police officers and other city employees. Compl. ¶¶ 5.20–5.32. The basic structure of Sunnyside’s Crime Free Rental Housing Program (CFRHP) remains unchanged from the version Washington challenged in *Sunnyside I*. Compl. ¶¶ 5.1-5.13; *see also Sunnyside I*, ECF No. 10 at 1-2 (describing operation of CFRHP); *Id.*, ECF No. 16 at 2-6 (same). Washington alleges that Sunnyside’s use of unlawful evictions has been the City’s official policy for years, has affected numerous residents, is ongoing now, and constitutes a continuing violation. *Id.* ¶ 5.30.

III. ARGUMENT

A. Motion to Dismiss Standard

On a motion to dismiss, the Court must accept all well-pled allegations of material fact as true, and draw all reasonable inferences in favor of Washington. *Wyer Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The issue for the Court is “only whether the complaint states a

claim upon which relief can be granted,” and not whether Washington will ultimately prevail on the merits. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1100 (9th Cir. 2010) (internal quotations omitted).

B. The Allegations of the Complaint Establish Washington’s *Parens Patriae* Standing

Washington has *parens patriae* standing to enforce both 42 U.S.C. § 1983 (§ 1983) and the federal Fair Housing Act (FHA). *See Pennsylvania v. Porter*, 659 F.2d 306, 315 (3d Cir. 1981) (en banc) (Pennsylvania Attorney General properly brought police misconduct case under § 1983); *Oregon ex rel. Dep’t of Transp. v. Heavy Vehicle Elec. License Plate, Inc.*, 157 F. Supp. 2d 1158 (D. Or. 2001) (state has *parens patriae* authority to sue under § 1983); *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (city has standing to bring FHA discrimination claim because of detrimental impacts to the city as a result of defendant’s predatory lending practices); *New York v. 11 Cornwell Co.*, 695 F.2d 34, 38-40 (2d Cir. 1982) (New York attorney general has *parens patriae* standing to bring 42 U.S.C. § 1985(3) claim against property owners for disability discrimination in housing).

A state has *parens patriae* standing where the consequences of the defendants’ actions—if left unchecked—indirectly injure the health and well-being or the federal rights of residents beyond those directly harmed. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607

(1982). Thus, to determine whether a state has *parens patriae* standing, a court “must” consider not only the direct effects of the defendant’s actions, but also whether the defendant’s actions, if allowed to continue, would *indirectly* injure additional state residents. *Id.*; *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017), *cert. denied sub nom. Missouri ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017).

Snapp and its progeny emphasize that *parens patriae* standing exists even where the number of residents directly affected by the defendants’ conduct is relatively small, but where allowing the conduct to continue would indirectly impact more. In *Snapp*, Puerto Rico sued as *parens patriae* to protect Puerto Rican workers from discrimination during one harvest season in Virginia’s apple industry. *Snapp*, 458 U.S. at 592. The Supreme Court expressly disagreed with the district court’s “narrow view” that Puerto Rico lacked *parens patriae* standing because the number of Puerto Ricans directly affected was small compared to Puerto Rico’s overall population.¹ *Snapp*, 458 U.S. at 609. The Supreme Court observed that discrimination against some Puerto Ricans is a harm that creates a “universal sting” for all Puerto Ricans and impacts many more than the discreet group of individuals who directly experienced discrimination during the 1978 apple harvest. *Id.* at 597, 609.

¹ Just 0.026% of the population (i.e., 787 of approximately 3,000,000 at the time (https://en.wikipedia.org/wiki/Demographics_of_Puerto_Rico)).

Subsequent civil rights cases emphasize and reinforce the *Snapp* precedent, which is contrary to this Court’s previous suggestion that *parens patriae* standing requires direct injuries “across municipalities” or of “statewide magnitude.” *Cf. Sunnyside I*, ECF No. 16 at 11. Thus, Pennsylvania had standing to sue a municipality to remedy the alleged misconduct of a single police officer over a four-year period. *Porter*, 659 F.2d at 310. New York had *parens patriae* standing to sue a neighborhood group trying to prevent the establishment of a home for just eight to ten mentally disabled persons in Rockville Centre, a town with 25,412 residents at the time.² *11 Cornwell*, 695 F.2d at 39-40. Despite the small proportion of total New York residents directly impacted, the court recognized *parens patriae* standing because allowing the defendant’s discriminatory conduct to continue indefinitely would “deprive any number of [mentally disabled] persons of the opportunity to receive rehabilitation.” *Id.* at 39. Further, the Court observed that “defendants’ conduct also require[d] the State to bear the cost of keeping more people in institutions” and deprived “both [mentally disabled] persons and community residents of being able to live in integrated communities.” *11 Cornwell*, 695 F.2d at 39-40 (“And, were this kind of incident to be tolerated and left without redress, countless others would be

² *Census of Population and Housing*, Table 14, p. 34-15 (1980), https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu80134unse_bw.pdf.

1 affected. The ‘sting’ here is almost as ‘universal’ as it was in *Snapp*.”) (internal
 2 citation omitted). Other courts likewise recognize *parens patriae* standing where
 3 the number of directly affected individual is relatively small, but where the
 4 potential effects extend more broadly. *See, e.g., Support Ministries For Persons*
 5 *With AIDS, Inc. v. Village of Waterford.*, 799 F. Supp. 272, 277-78
 6 (N.D.N.Y. 1992) (New York had *parens patriae* standing to challenge one
 7 village’s discriminatory conduct preventing establishment of a single home for
 8 up to fifteen homeless persons with AIDS because the conduct
 9 indirectly would affect all homeless persons with AIDS in the state);
 10 *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 100-01 (D. Mass.
 11 1998) (Massachusetts had *parens patriae* standing in case alleging discrimination
 12 against 50 older workers because of the “sting” felt by all older workers statewide
 13 and because other employers could successfully discriminate if Massachusetts
 14 were not allowed to challenge the defendant’s conduct); *New York v. Peter &*
 15 *John’s Pump House, Inc.*, 914 F. Supp. 809, 812-13 (N.D.N.Y. 1996) (New York
 16 had *parens patriae* standing to sue a nightclub for racial discrimination where
 17 allegations described experiences of just sixteen Black patrons, noting that the
 18 number of persons directly impacted by the challenged conduct is not
 19 determinative of *parens patriae* standing, recognizing the alleged incidents were
 20 only examples of the defendants’ conduct, and that discrimination
 21 “has a destructive societal effect justifying *parens patriae* standing”);
 22

1 *New York v. Mid Hudson Med. Grp., P.C.*, 877 F. Supp. 143, 145-48 (S.D.N.Y.
 2 1995) (*parens patriae* standing to sue a hospital *based on a single complaint* that
 3 the hospital had refused to provide a sign language interpreter because such
 4 conduct indirectly impacted all hearing-impaired persons in New York). Put
 5 bluntly, few, if any, of these important civil rights cases could have been brought
 6 if state standing required, as the Court previously suggested, direct injuries of a
 7 “statewide magnitude.” *Cf. Sunnyside I*, ECF No. 16 at 11.

8 Even *Koster*, a case on which Defendants previously relied, supports
 9 Washington’s standing. In *Koster*, a group of Midwestern states did not have
 10 *parens patriae* standing to challenge California laws related to egg sales because
 11 those laws had no impact—direct or indirect—beyond an “‘identifiable group of
 12 individual’ egg farmers.” *Koster*, 847 F.3d at 652 (citation omitted). The court
 13 emphasized that the Plaintiff States’ harms were purely speculative because the
 14 California regulations had not yet gone into effect. *Id.* at 653. Even once they did,
 15 Plaintiff States could not say whether its citizens would be harmed, and Plaintiff
 16 States’ farmers would be treated the same as California’s own egg farmers. *Id.* at
 17 653-55. In other words, there could be no allegation that California’s egg laws
 18 would harm Plaintiff States’ residents or that Plaintiff States’ egg farmers would
 19 feel the universal sting of discrimination, because all egg farmers were being
 20 treated equally. *Id.* Thus, *Koster* simply clarifies the application of the *parens*
 21 *patriae* doctrine in the Ninth Circuit: a state has standing where it alleges direct
 22

1 harm to an identified group of residents, *and* where it is reasonable to conclude
 2 that allowing the challenged conduct to continue may have broader, indirect
 3 effects on residents beyond those directly impacted.

4 Consistent with *Snapp* and its progeny, Washington has *parens patriae*
 5 standing because it alleges that Defendants' unlawful evictions directly harm
 6 Sunnyside residents *and* indirectly injure its residents beyond Sunnyside.
 7 Defendants have unlawfully enforced the CFRHP against more than two-dozen
 8 residents, making at least twenty people homeless, most for months, and
 9 jeopardizing the housing of at least five more. Compl. ¶¶ 5.22-5.29. That is more
 10 than the number directly affected in *11 Cornwell* (10-12), *Support Ministries* (up
 11 to 15), *Pump House* (16), and *Mid Hudson* (1). Moreover, Washington has
 12 alleged that these incidents are merely illustrative of Defendants' unlawful
 13 conduct. Compl. ¶ 5.30. This allegation is reasonable in this pre-discovery phase,
 14 given that Defendants have operated a CFRHP since 2010, yet all of the alleged
 15 incidents described in the complaint occurred between July 2015 and July 2018.
 16 Compl. ¶¶ 5.1, 5.22-5.29. These facts indicate that Washington likely will find
 17 additional residents during discovery who were directly harmed, particularly
 18 because the incidents Washington has uncovered to date involve the same
 19 officers and a repeated pattern of conduct. *Id.* But even with the 25 directly
 20 harmed residents Washington knows of now, Washington has *parens patriae*
 21 standing under decades of civil rights cases applying the doctrine.
 22

1 What is more, beyond the direct impacts to specific Sunnyside residents,
 2 Washington alleges the indirect effects of the unlawful evictions on other
 3 Sunnyside renters and Washingtonians in other communities where a CFRHP is
 4 in place. Sunnyside's CFRHP program is mandatory. Compl. ¶ 5.2. So, all of
 5 Sunnyside's residents who rent homes now or in the future are subject to
 6 Sunnyside's unlawful policy of enforcement of its CFRHP, which allows a single
 7 police officer to evict families without any judicial order or process. In Sunnyside
 8 and Washington in general, residents who live in rental housing are
 9 disproportionately Latino/as, women, and families with children.
 10 Compl. ¶¶ 5.34- 5.36. All of these tenants—especially Latino/as, women, and
 11 young families—are in danger of being evicted from their homes at Defendants'
 12 whim or from copycat officials in other cities with CFRHPs if Defendants'
 13 unlawful evictions are allowed to continue. Compl. ¶ 5.43. Othello, a town near
 14 Sunnyside with a CFRHP, has also unlawfully evicted tenants or wrongfully
 15 issued CFRHP notices that have jeopardized people's homes. Compl. ¶ 5.44.
 16 Indeed, if Sunnyside's practices receive court approval, police statewide may
 17 conclude that the law permits extra-judicial evictions, even in cities that do not
 18 have CFRHPs. Many evicted residents could become homeless, as did twenty
 19 Washingtonians in the examples cited in the Complaint, which would put
 20 additional strain on Washington's public resources. *See Porter*, 659 F.2d at 315

1 (finding standing where costs of civil rights violations are “ultimately . . . borne
2 by the Commonwealth”).

3 Respectfully, this Court’s order in *Sunnyside I* granting Defendants’
4 motion to dismiss held Washington to a stricter standard than is supported by
5 *Snapp* and its progeny. *Sunnyside I*, ECF No. 16 at 10-11 (faulting Washington
6 because it “[did] not include sufficient allegations that the CFRHP is the cause of
7 similar problems in other municipalities,” “does not seek relief beyond the
8 context of Sunnyside,” and “articulate[d] only three specific instances in which
9 discriminatory treatment allegedly occurred through enforcement of the CFRHP
10 in Sunnyside, a municipality with ‘over 16,000 residents’”). But neither *Snapp*,
11 *Koster*, nor any other case cited by any party or the Court requires an allegation
12 that parties *besides* the defendant have *also* engaged in illegal conduct, or that the
13 defendant’s conduct directly impacted residents beyond those described in the
14 complaint. *Cf. Koster*, 847 F.3d at 651 (the number of persons directly impacted
15 by the challenged conduct is not determinative of *parens patriae* standing)
16 (quoting *Snapp*, 458 U.S. at 607); *11 Cornwell*, 695 F.2d at 39-40; *Support*
17 *Ministries*, 799 F. Supp. at 277-78; *Bull*, 16 F. Supp. 2d at 100-01; *Pump House*,
18 914 F. Supp. at 812-13; and *Mid Hudson*, 877 F. Supp. at 145-48. Neither do
19 those cases require Washington to seek statewide relief beyond the perpetrators
20 of the challenged conduct. Rather, Washington has alleged what the *Snapp*-line
21 of cases requires: conduct that, if left unchecked, will continue and could spread
22

1 to other cities, resulting in more direct harm to residents and, more importantly,
 2 indirect injury to state residents who will learn that municipal police face no
 3 consequences for depriving residents of their basic rights to due process and equal
 4 treatment under the law.

5 Like the numerous other federal courts that have analyzed this issue, this
 6 Court should hold that Washington, as *parens patriae*, has standing to maintain
 7 its § 1983 and Fair Housing Act claims against Defendants.

8 **C. Washington's Claims Are Timely**

9 Washington law expressly exempts Washington's claims from the statute
 10 of limitations, providing "there shall be no limitation to actions brought in the
 11 name or for the benefit of the state." Wash. Rev. Code § 4.16.160; *see also*
 12 *Washington v. LG Elecs., Inc.*, 375 P.3d 636, 642 (2016) ("Thus, unless there is
 13 an express provision to the contrary, no statute of limitations applies to actions in
 14 the name of or for the benefit of the State."). Here, Washington brings its claims
 15 to protect the health and well-being of its residents caused by Defendants'
 16 unlawful evictions. The very purpose of Washington's *parens patriae* action is
 17 to benefit Washingtonians broadly, and not just identifiable individuals. Thus,
 18 Washington has brought its claims in the name of or for the benefit of the state,
 19 and is exempt from any state statute of limitations.

20 For an action filed under § 1983, the Court looks to the law of the state in
 21 which the cause of action arose and applies that state's personal injury suit statute
 22

1 of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (the relevant statute of
 2 limitations “is that which the State provides for personal-injury torts”). Although
 3 the statute of limitations for personal injury actions in Washington is generally
 4 three years from the time the cause of action accrues, *see* Wash. Rev. Code
 5 § 4.16.080, federal courts apply all applicable exemptions and tolling provisions
 6 provided by state law. *Wallace*, 549 U.S. at 394. Wash. Rev. Code § 4.16.160 is
 7 such a provision, so no statute of limits applies to Washington’s § 1983 claim.

8 Even if the three-year statute of limitations did apply, Washington alleges
 9 a continuing violation, and the Complaint includes two examples of Sunnyside
 10 police officers unlawfully evicting residents within the claimed limitations
 11 period. Compl. ¶¶ 5.24, 5.25. *See Gutowsky v. County of Placer*,
 12 108 F.3d 256, 260 (9th Cir. 1997) (applying the “continuing violations” doctrine
 13 to § 1983 claim and determining the statute of limitations did not commence until
 14 occurrence of the last act constituting the continuing violation) (citation omitted);
 15 *see also Victor Valley Family Res. Ctr. v. City of Hesperia*, No. ED-CV-16-
 16 00903-AB, 2016 WL 3647340, at *4 (C.D. Cal. July 1, 2016) (concluding the
 17 statute of limitations period was not triggered when the city adopted the
 18 challenged ordinance, but when the city enforced it).

19 Because the three-year statute of limitations is inapplicable to this law
 20 enforcement action brought in the name of the state, and because Washington
 21
 22

1 alleges a continuing violation with at least one violation falling within the
2 claimed limitations period, Washington's § 1983 claims are timely.

3 **D. Washington's Allegations Establish Municipal Liability Against**
4 **Sunnyside**

5 For Sunnyside to be liable under § 1983, the city must have deprived
6 residents of their constitutional rights pursuant to a city policy or custom.
7 *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985). Washington's
8 complaint alleges just that.

9 The policy or custom must be "a deliberate choice to follow a course of
10 action . . . made from among various alternatives by the official or officials
11 responsible for establishing final policy with respect to the subject matter in
12 question." *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) (internal citation
13 omitted). Courts recognize constitutional violations where a city ordinance fails
14 to establish sufficient procedural safeguards before depriving residents of their
15 home. *See, e.g., Victor Valley Family Res. Ctr.*, 2016 WL 3647340 at *5 (issuing
16 preliminary injunction where it was unclear whether challenged city housing
17 ordinance provided procedure for tenant to contest the findings under the city's
18 Crime Free Rental Housing Program prior to the initiation of eviction
19 proceedings); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1059
20 (S.D. Cal. 2006) (granting temporary restraining order to stop the city from
21 sanctioning landlords for not evicting tenants who are unlawfully in the United
22

1 States because it “fail[ed] to provide for notice or hearing of any kind prior to the
2 deprivation of an illegal alien’s tenancy interest”).

3 Here, as in *Victor Valley Family Res. Ctr.* and *Escondido*, Washington has
4 alleged facts sufficient to show that Sunnyside deprived the evicted tenants of
5 their constitutional rights pursuant to a city policy or custom. Sunnyside describes
6 the CFRHP as mandatory citywide. Compl. ¶ 5.2. Sunnyside’s policy or practice
7 of enforcing the CFRHP using extrajudicial evictions “has been Sunnyside’s
8 official policy for years, has affected numerous residents, and constitutes an
9 ongoing and continuing violation.” *Id.* ¶ 5.30. Sunnyside also fails to provide
10 training on the CFRHP to any Sunnyside employees, including its police officers
11 who enforce the ordinance. *Id.* ¶ 5.12. And Washington alleges that Sunnyside
12 Police Chief Escalera, who is responsible for policy development and program
13 implementation for the police department, knowingly or recklessly allowed
14 officers to evict tenants without a court order, hearing, or evidence of criminal
15 activity. *Id.* ¶¶ 5.26, 5.39–5.42.

16 These allegations, taken as true for purposes of this motion, show that
17 Sunnyside has a policy or custom—authorized at the highest levels of the City—
18 to cast out tenants without due process and in complete disregard of their federal
19 and state constitutional and statutory rights. At the pleading stage, Washington
20 has more than sufficiently alleged the lack of due process protections for tenants,
21 inadequate procedures to prevent unlawful evictions, lack of proper training for
22

city employees who enforce the CFRHP, and reckless indifference of city policymakers about the results. This Court should deny Sunnyside's motion to dismiss Washington's causes of action under § 1983.

E. Washington Has Alleged Facts Establishing a Prima Facie Case of Housing Discrimination Under Federal and State Law

Sunnyside argues that Washington's allegations under the Fair Housing Act (FHA), 42 U.S.C. § 3604(a)-(b), and the Washington Law Against Discrimination (WLAD), Wash. Rev. Code §§ 49.60.030(1), .222, are insufficient to state a claim. Motion at 9-10, 11-12. Sunnyside is incorrect.

The FHA, 42 U.S.C. § 3604(a), prohibits conduct that "make[s] unavailable or den[ies] . . . a dwelling to any person because of . . . sex, familial status, or national origin." 42 U.S.C. § 3604(a). The WLAD likewise makes it an unfair practice "[t]o . . . make unavailable or deny a dwelling, to any person" because of sex, status as a family with children, or national origin. Wash. Rev. Code § 49.60.222(1)(f).

Under a disparate impact theory, policies that create "artificial, arbitrary, or unnecessary barriers" to housing for members of a protected class are prohibited. *Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). The FHA and WLAD both allow discrimination to be established based on a policy's disparate adverse impact, without requiring proof of discriminatory intent.

1 *See, e.g., Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 745-46
 2 (9th Cir. 1996) (there is “no support for the proposition that . . . intent is required
 3 to establish a prima facie case of disparate impact under the FHA”); *Kumar v.*
 4 *Gate Gourmet, Inc.*, 325 P.3d 193, 204 (Wash. 2014) (“[T]he WLAD creates a
 5 cause of action for disparate impact[.]”).

6 To establish a prima facie disparate impact claim, a plaintiff must show
 7 “(1) the occurrence of outwardly neutral practices; that (2) result in ‘a
 8 significantly adverse or disproportionate impact on persons of a particular type
 9 produced by the defendant’s facially neutral acts or practices.’”
 10 *Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props, LLC*, No. C16-922 TSZ, 2017
 11 WL 2022462, at *2 (W.D. Wash. May 12, 2017) (quoting *Pfaff*, 88 F.3d at 745),
 12 *aff’d*, 743 F. Appx 116 (9th Cir. 2018). These requirements apply to both federal
 13 and state claims: Washington courts look to federal interpretations of the FHA’s
 14 discrimination provisions when interpreting the WLAD’s prohibition of housing
 15 discrimination. *Tafoya v. State Human Rights Comm’n*, 311 P.3d 70, 76
 16 (Wash. Ct. App. 2013).

17 Here, Washington has specifically pled that Sunnyside’s unlawful
 18 enforcement of the CFRHP disproportionately impacts Sunnyside residents who
 19 are Latino/as, families with children, or women, Compl. ¶¶ 5.33-5.38, and that
 20 Sunnyside’s policies and practices are the proximate cause of the extrajudicial
 21 evictions. *Id.* ¶ 5.37. *See Inclusive Cmty. Project*, 135 S. Ct. at 2523
 22

(disparate impact properly alleged where plaintiff “point[s] to a defendant’s policy or policies causing th[e] disparity”). By disproportionately affecting particular groups, Defendants’ enforcement of the CFRHP imposes different terms, conditions, and privileges in the rental of a dwelling based on protected classes; violates residents’ rights to engage in real estate transactions without discrimination; and makes unavailable or denies a dwelling based on protected class.

Sunnyside argues that Washington has not identified a policy or practice of the City that makes housing unavailable. *See* Motion at 9-10. This argument makes little sense, because a practice of ousting families without any due process and in violation of state landlord-tenant law, rendering them homeless, is certainly a policy of making housing “unavailable” to affected residents. *See* 42 U.S.C. § 3604(a); Wash. Rev. Code § 49.60.222(1)(f).

Finally, to the extent Sunnyside argues that it is not a proper defendant because there is no allegation that it is a landlord, *see* Motion at 10, Sunnyside’s argument fails. An aggrieved person may bring a housing discrimination claim against whatever entity used discrimination to make housing unavailable. *See Bank of America Corp.*, 137 S. Ct. at 1303 (suit against mortgage lender); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 510 (9th Cir. 2016) (suit against city). Sunnyside is a proper defendant because it has caused housing to be unavailable on a discriminatory basis.

F. Washington May Enforce the Residential Landlord Tenant Act

Sunnyside argues that Washington does not have authority to enforce the state’s Residential Landlord Tenant Act (RLTA). Motion at 13. However, the Washington Attorney General may represent Washington “in all cases in which the state is interested.” Wash. Rev. Code § 43.10.030(1). The Attorney General has “discretionary authority to act in any court, state or federal, trial or appellate, on ‘a matter of public concern’ provided that there is a ‘cognizable common law or statutory cause of action[.]’” *City of Seattle v. McKenna*, 259 P.3d 1087, 1092 (2011) (citation omitted). Sunnyside’s actions of disregarding the RLTA’s requirements of notice and process before evicting residents is unquestionably a matter of public concern.³ To the extent Sunnyside again argues that the City cannot be liable under the RLTA because it is not a landlord, Sunnyside’s argument remains misplaced. The RLTA does not limit liability to landlords and tenants; rather, it imposes a duty of good faith on anyone performing or enforcing the duties imposed by the RLTA. Wash. Rev. Code § 59.18.020.

³ *Washington v. Schwab*, 693 P.2d 108 (Wash. 1985), does not hold otherwise. In *Schwab*, the court simply observed that the RLTA could not be enforced by the Attorney General through the authority conferred on the Attorney General in the Consumer Protection Act. 693 P.2d at 113-14. The *Schwab* court nowhere precluded the Attorney General from enforcing the RLTA pursuant to its separate authority under Wash. Rev. Code § 43.10.030(1) and *McKenna*.

1 In sum, Washington is carrying out its duty to ensure that Washington's
2 residents receive the protections provided by the RLTA. This Court should deny
3 Sunnyside's motion to dismiss Washington's sixth and seventh causes of action.

4 **G. Washington Does Not Seek Damages for Violations of the Washington**
5 **Constitution**

6 Defendants argue that no damages remedy is available for state
7 constitutional violations. Motion at 10-11. However, Washington seeks
8 declaratory and injunctive relief for Sunnyside's state constitutional violations—
9 not damages. *See* Compl. ¶¶ 9.1-9.5. Courts applying Washington law have
10 power to declare the rights, or to restrain the acts, of all parties involved.
11 Wash. Rev. Code §§ 7.24.010, .190; *see also Reeder v. King County*,
12 358 P.2d 810, 564 (Wash. 1961) ("The Declaratory Judgments Act should be
13 liberally interpreted in order to facilitate its socially desirable objective of
14 providing remedies not previously countenanced by our law."). Since
15 Washington seeks declaratory and injunctive relief to remedy Defendant's
16 repeated violations of the state constitution's guarantee of due process by evicting
17 tenants without any judicial or other process, there is no basis for dismissing this
18 claim.

19 **H. Remand to State Court is the Only Possible Remedy if This Court**
20 **Lacks Subject Matter Jurisdiction**

21 Where both federal and state court have concurrent jurisdiction,
22

1 a plaintiff may choose whether to file the case in state or federal court.
 2 *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016). If the
 3 plaintiff files in state court, the defendant can remove to federal court; however,
 4 if the federal court lacks subject matter jurisdiction, it *must* remand the case to
 5 state court, rather than dismiss it. 28 U.S.C. § 1447(c); *Polo*, 833 F.3d at 1196;
 6 *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257-58 (9th Cir. 1997)
 7 (“Section 1447(c) is mandatory, not discretionary.”) (citation omitted). “Remand
 8 is the correct remedy because a failure of federal subject-matter jurisdiction
 9 means only that the *federal* courts have no power to adjudicate the matter. State
 10 courts are not bound by the constraints of Article III.” *Polo*, 833 F.3d at 1196
 11 (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)). Here, this Court has
 12 subject matter jurisdiction because Washington has *parens patriae* standing to
 13 maintain its federal claims. However, even if this Court were to again find that it
 14 lacks subject matter jurisdiction, the only remedy is to remand this case to state
 15 court.
 16
 17
 18

19 IV. CONCLUSION

20 For the foregoing reasons, Washington respectfully requests that this Court
 21 deny Sunnyside’s motion to dismiss in its entirety.
 22

1 DATED this 26th day of March, 2020.

2
3 Respectfully Submitted,

4
5 s/Mitchell A. Riese
6 MITCHELL A. RIESE, WSBA #11947
7 NEAL LUNA, WSBA #34085
8 Assistant Attorneys General
9 Wing Luke Civil Rights Division
10 Office of the Attorney General
11 800 Fifth Avenue, Suite 2000
12 Seattle, WA 98104
13 (206) 464-7744
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system which will send notification of such filing to the following:

Attorney for Defendant City of Sunnyside
KIRK A. EHLIS
SEANN M. MUMFORD
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, Washington 98902
kehlis@mjbe.com
smumford@mjbe.com

DATED this 26th day of March, 2020.

s/Mitchell A. Riese
Mitchell A. Riese